CHIEN DECLARATION

EXHIBIT A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

STATE OF WASHINGTON, Plaintiff, v. THE GEO GROUP, INC., Defendant.	C17-5806-RJB TACOMA, WASHINGTON September 12, 2019 9:30 a.m. Motion Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

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THE COURT: Good morning. Okay. This is cause number 17-5806, State of Washington versus the GEO Group. And it comes on this morning for oral argument regarding the pending motion for reconsideration and also on the continuing issue of intergovernmental immunity.

Let me get your appearances first, here. For the plaintiff?

MS. CHIEN: Marsha Chien for the State of Washington.

MR. POLOZOLA: Lane Polozola also for the State of Washington, Your Honor.

MS. BRENNEKE: I'm Andrea Brenneke for the State of Washington.

THE COURT: Okay. And for the defense?

MR. BARNACLE: Colin Barnacle on behalf of GEO Group.

THE COURT: Mr. Barnacle.

MS. MELL: And Joan Mell on behalf of GEO Group.

THE COURT: First, before we start argument here, I'm mindful that the plaintiffs, particularly, have objected to the United States' statement of interest or I should say statements of interest. I think the court should consider those statements of interest for a number of reasons.

First, the government has the right to show the court its interests, pursuant to 28 United States Code Section 517. And they can do that without appearing as a party. Second, the United States' statement of interest cited at least two

cases in their statements of interest that are relevant and were not cited to the court in their final forms at our first go-around on intergovernmental immunity, that's simply because they were finally decided after the court's rulings last December on that subject. And those cases, *Dawson v. Steager* and *United States v. California*, helped to clarify the law on intergovernmental immunity. And I think it's important for the court to consider them.

Third, I am mindful that the statement of interest is outside the court's planned schedule for the case. It raises something late that we thought was put to bed early. But the parties have had due process notice and an opportunity to be heard on that subject. And if there was an error it should be fixed as soon as possible.

So, in other words, neither the court nor the plaintiffs, at least, like the timing, but there's no harm and no foul by raising these issues again later in the case.

Fourth, the current reconsideration of the intergovernmental immunity question is not consideration of a motion by a non-party. The government did not make a motion. And I think you should consider the court's concern about that issue as being raised sua sponte by the court. And it's raised out of concern for the accuracy of the law and the law's interpretation as applied here. That's a long way of saying that I don't want to hear more about the propriety of

further consideration of intergovernmental immunity. We'll get to that.

Now, this started out with the motion for reconsideration filed by the defendants, or defendant, under Docket 289. So I think the defense should go first.

MR. BARNACLE: Thank you, Your Honor. The motion for reconsideration, as well as the reply, focus on three primary things. Number one, derivative sovereign immunity. The motion for reconsideration highlights what it believes is a fundamental flaw in the Ninth Circuit's decision in the *Cabalce* case. We believe it was decided upon two cases, *Hanford*, and then the Supreme Court's decision in *Boyle*, that sort of introduced the idea of discretion in the design process in the government contractor defense discretionary function exemption context.

And by catapulting those concepts into the derivative sovereign immunity discussion in this case, via *Cabalce*, it introduced a concept of discretion that has no place under the law. And so by introducing this concept of discretion in the design process, the state has latched onto that, and basically said because GEO could pay more than one dollar, they are no longer entitled to derivative sovereign immunity. That's the argument they're making.

At the end of the day, the contract says at least one dollar. So under *Yearsley* and *Campbell-Ewald*, as long as you

follow the contract, which is at least one dollar, paying one dollar follows that directive in the contract.

By introducing this concept of discretion, what they've done is kind of taken the argument away from what they're actually seeking in this lawsuit, which is a declaration -- their complaint is very clear, they want a declaration that these detainees are statutory employees under the Minimum Wage Act. That's very different than a lawsuit saying that they can pay more than one dollar. If this lawsuit was about paying more than one dollar, and that's what they said, we wouldn't be here today because we would have had that dismissed, because there's no law that says you have to pay more than one dollar.

The law that they're trying to impose here is they are employees entitled to minimum wage. If you focus on that argument, which we must, that runs afoul of the contract. The contract says you pay at least one dollar. And because of federal law, you cannot treat the detainees as employees. They cannot be employees.

So, GEO has followed those two very explicit directions in its contract, and introducing the concept of discretion to pay more than one dollar takes us away from what we're actually arguing about in this case.

So why have they done that? I think they've done it for a couple reasons. One, they understand that it poses this

issue for derivative sovereign immunity, and they're trying to meander their way out of that issue. It also creates the incredible preemption issue. And that's kind of the second point of our motion for reconsideration.

If you look at the Minimum Wage Act up against the IRCA, which says you cannot employ people who are not work-authorized, you cannot have those two together. They are asking in this lawsuit that we employ these people pursuant to the Minimum Wage Act. That runs directly against the IRCA, which says you cannot employ this classification of individuals.

So by saying we're not talking about employing the detainees, that's not what this is about, that's a red herring, Your Honor. I think we have to focus in on what the Minimum Wage Act, in calling these people employees, in how that is preempted by the IRCA.

Then finally, through these arguments, the state has effectively made a proposal for how GEO can meander through all of these laws and still comply with everything. They have come up with a proposal for how they can comply with the Minimum Wage Act, how they can operate a Voluntary Work Program, and how they can comply with the IRCA, all in one fell swoop. And that is simply employ those who are work-authorized, and/or employ people in the City of Tacoma.

By making that proposal they are effectively directly

regulating the ICE contract. The ICE contract and the PBNDS say: GEO, you will have this Voluntary Work Program, it's for all detainees, it is for the purposes of reducing idleness, for increasing morale, and for lessening disciplinary actions against detainees. By saying no, we're going to create a Voluntary Work Program that's limited to this set of people, that is directly saying, federal government, your PBNDS, they don't matter. We're going to say what this Voluntary Work Program is, and it's not going to be what you say it is. It's going to be this limited purpose.

So I think by making that argument they walk themselves into a direct regulation intergovernmental immunity issue as well.

Thank you.

THE COURT: Okay. You may want to comment on this. It seems to me that the state has a burden of proof in this case, under their theories, that, in fact, members of -- well, I should say some detainees are being used as employees, contrary to the contract, and that also they would, in proving that, have the burden of proving that GEO violates the law that says they can't employ aliens that are not qualified to be employed.

If they can prove those two things to a jury, doesn't your argument go away? In other words, I don't -- I doubt that

GEO can treat people as employees under the Minimum Wage Act standards and then say, well, they can't be employees because federal law says that we can't employ them. I mean, if GEO is doing it, then, you know -- but the state would have to prove those two things, that you're using them inappropriately, and that that's a violation of IRCA.

MR. BARNACLE: Understood, Your Honor. And you're actually articulating some arguments that they did not make, which in response to our summary judgment on derivative sovereign immunity and preemption, their response talked about discretion in the design process and how GEO could have paid more than one dollar; and they argued on that point. And in their reply brief they took another approach, which basically said they do comply with derivative sovereign immunity standards because the word "applicable law" is something that injects the Minimum Wage Act into the contract.

So they do not argue or raise the issue that GEO is not complying with its contract because it is, in fact, using detainees in the role of employees and performing functions as employees. They don't have that factual record before us on this motion. So I believe that's not before the court as we sit here for this motion for summary judgment. The facts aren't in the record.

THE COURT: Okay. Do you want to respond on the

motion for reconsideration first here, Ms. Chien?

MS. CHIEN: Your Honor, my name is Marsha Chien, and I represent the State of Washington. I'll be addressing GEO's arguments regarding derivative sovereign immunity, preemption, and the Minimum Wage Act, which counsel did not mention in the oral arguments but brought up in his papers. And my colleague, Lane Polozola, will be arguing and responding to the U.S.'s statement of interests.

First, regarding derivative sovereign immunity, GEO argues that in *Cabalce* the Ninth Circuit confused the law. No Supreme Court decision, no Ninth Circuit decision, no other circuit court has distinguished, considered *Cabalce* or identified *Cabalce* as bad law. It is inappropriate for this court to, district court, to overturn Ninth Circuit precedent. That is inappropriate.

Even setting aside *Cabalce*, GEO fails to meet the standard for derivative sovereign immunity under *Campbell-Ewald*. *Campbell-Ewald* states that immunity applies when the contractor simply performs as directed. That's the exact language from *Campbell-Ewald*. GEO would have you ignore that language, because the fact of the matter is ICE has never directed GEO to pay a dollar a day. ICE has stated in e-mails to GEO that there is no maximum to the dollar a day, specifically suggesting that it does not direct GEO in terms of its payments to detainees.

GEO in this case, in discovery, has agreed it has the option to pay more than a dollar a day. And it has done so in the past.

Regarding GEO's argument that the Minimum Wage Act is not an applicable state labor law, that is completely false. It is clearly an applicable state labor law. The Minimum Wage Act is general applicable law that applies to all private contractors, including GEO. None of the GEO ICE contract provisions that GEO has cited directs GEO to do otherwise.

To the extent that GEO argues the contract's "no detainee as employee" provision conflicts with state law, the state notes that a contract provision cannot preempt state law. And regardless if there were any conflict, the GEO ICE contract specifically states that the most stringent standards should apply, i.e., the Minimum Wage Act, not a lower standard, which is just at least a dollar a day.

Regarding GEO's argument, which -- and I just want to make this point, because counsel reiterated it, it was in its papers and counsel reiterated it in its oral arguments, blurring the lines between derivative sovereign immunity and intergovernmental immunity. Those doctrines are separate. They're based on two separate bodies of law. They stem from separate Supreme Court case law.

And in blurring the lines and arguing that GEO has whatever sovereign immunity that the federal government has,

it undercuts basic tenets of both doctrines. But independent of derivative sovereign immunity is that GEO only gets immunity if it simply performed as directed. It does not just get any immunity the federal government has.

Similarly, intergovernmental immunity allows for direct regulation of federal contractors. So to the extent that GEO dislikes the federal contractors, the quote-unquote direct regulation, the state is allowed to directly regulate federal contractors in a non-discriminatory manner, which is what we've done here, and which my colleague will continue with that conversation.

Regarding GEO's argument on preemption. I think Your Honor hit exactly the point that we were discussing, when you were asking your questions of GEO. There are work-authorized detainees within the detention facility. Counsel is incorrect that there's nothing in the record suggesting there are work-authorized detainees. On our motion for summary judgment we submitted documentation that there are work-authorized detainees within the Northwest Detention Center. And GEO responded and admitted there are green card holders, i.e., people with work authorization, within the Northwest Detention Center. So when they operate with all 5,075 detainees, or 1,000, or 200 work-authorized detainees, the VWP will still exist. So there is no conflict.

I also wanted to, again, reiterate the point on this

preemption, because GEO's repeated reference back to the contract is inappropriate, also in the preemption context. Again, GEO stated in its oral argument, I believe, that the state's minimum wage law runs afoul of the contract. That is not enough for preemption. It is law, not contract, that can preempt state law. ICE -- neither GEO nor ICE can preempt state law by the contract.

I also want to address one argument made in GEO's papers, and highlight. GEO states that the state's case declares -- is problematic or conflicts with the contract and precludes it from operating a VWP. I just want to emphasize the state does not seek to eliminate the Voluntary Work Program, it seeks only to require GEO to pay the minimum wage, if it chooses to use detainees to complete work within the facility.

If Your Honor has no further questions.

THE COURT: No, that's fine. We haven't got into the intergovernmental immunity. Let's confine our arguments at this point to the motion for reconsideration.

MS. MELL: Thank you, Your Honor. Joan Mell on behalf of the GEO Group. We're going to divide the issues. He's going to address the two cases on intergovernmental immunity addressed in the Department of Justice briefing, and I want to hit on your two policy questions.

You have said that the state carries the burden of proof

of proving that some detainees are being used as employees, contrary to the contract. Another way of framing your issue is whether the state may control how the federal government, through its contractors, uses detainees within their facilities, and/or cares for their health, safety and welfare. The Voluntary Work Program is an established policy decision by the federal government as how to care for its detainees to ensure that the chores are taken care of and accomplished in a way that is applicable to a detention facility.

So you necessarily invade the public-policy decisions of the federal government when you allow the state to come in and apply, discriminately, its Minimum Wage Act to a federal detention facility where the detainees are within its custody and control. Because there's no way to drill down to this dollar-a-day issue, and decide what's a fair rate, without first deciding that they are employees, which removes the federal government's capacity to operate a federal facility, according to detention standards. And detention standards are established in the same way that the state has.

Very telling are the depositions recently taken of the Office of the Governor and of the Department of Labor and Industries. The department has conceded that were a federal government employee to call and complain about minimum wages, they would close the claim and say, sorry, we don't look into

the way the federal government treats its employees. And in 2014 they said that extended to detainees, because they are their instrumentalities.

It is the duty and responsibility of the federal government to protect these people and care for them under a policy umbrella that has the greatest federal preemption protections in the universe, i.e., immigration. So there is no way to not violate sovereign immunity by allowing the state to put before a fact finder whether or not GEO has been taking the detainees within the facility and allowing them to participate in a Voluntary Work Program, in a way that that means they're actually employees.

The very fact that they're detainees in a Voluntary Work Program means the federal government gets to decide how to use them. And the state has done the same whole analysis. So the state came up with a constitutional amendment and applied it and let private contractors use detainees at subminimum wages. They had a whole entire graph we got that shows there's very little money paid to those entities.

And the Governor's office acknowledged that every step of the way in this decisionmaking are policy choices, how to secure the facility. If you suddenly elevate an argument to a fact finder that you're going to invade this Voluntary Work Program and oversee it and make sure that they're not actually employees, you are then putting at risk, if decided

that they are, that now the facility must employ them if they're going to have them engage in these particular activities.

And if they are then employed, there's only so much activity that can go on there. So then GEO and the federal government has to address the corruption issues that necessarily come with a limited few being able to participate in a limited number of activities.

Or alternatively, that now you have to run a hotel-model program down there where nobody but a limited few have to do any particular activity, or have the opportunity to do any activity. And those activities that are done then benefit all of the rest of the individuals who are down there who no longer have to do any chores. Or they can just pay off the people, and there's a whole internal barter system.

Detention is a whole unique animal. The fact that it's detention, and that it's federal detention, and these are people within the federal government's jurisdiction and control, on immigration issues, necessarily means you cannot allow the state to come in and try to establish that their program is something it's not. That's why sovereign immunity applies on that question.

The second question. They have the burden of proving GEO violates the federal law -- I think is what you were saying -- and is violating by actually employing these

people. That presupposes, from its inception, that there is an issue that may be decided as to the legal status of detainees, which invades, again, the same analytical reasons I just scrolled through, that these people within the federal jurisdiction and control actually are being employed in violation of the federal law.

On its face you're invading the policy choices and decisionmaking of the federal government, how to enforce its own laws. It necessarily, up front, gets us into this question of sovereign immunity. And I'm going to sidestep and let him argue those cases.

Thank you, Your Honor.

THE COURT: Just a minute. Are we through with the motions regarding reconsideration of the earlier order?

MR. BARNACLE: Yes, Your Honor.

MS. CHIEN: I'm happy to respond to the arguments that were just presented.

THE COURT: Well, let me deal with the motion for reconsideration.

First, I think *Cabalce* is good law. I don't think it matters much if we follow that case or *Yearsley* or the *Ewald* case. You have to keep in mind that this was a motion for summary judgment. And it seems to me that the defendant's arguments basically ignore the plaintiff's proof going into the summary judgment phase. I think there are issues of fact

all over the place in regard to these defenses of, not intergovernmental immunity, but the other kinds of immunity that are urged here. There are just issues of fact on those things when you consider the plaintiff's positions and showing.

I'm not going to change the earlier ruling on the motion for reconsideration. And the motion for reconsideration filed under Docket 289 is denied.

Now, let's turn our attention to the question of intergovernmental immunity that we thought we had put to rest back in December.

MR. BARNACLE: Thank you, Your Honor. In addition to my colleague's comments, I just want to give a brief discussion of the two cases that you referenced, *Dawson v. Steager* and *U.S. v. California*. *Dawson*, which was decided just this year, specifically states that for the purposes of intergovernmental immunity, the question isn't whether the federal entities are similarly situated to state entities who don't receive the benefit, the relevant question is whether they are similarly situated to those who do.

So if we think about that question, that question is who receives the benefit? Who is exempted from minimum wage? We know that state-run facilities are exempted from minimum wage by the statute itself. We know that despite the fact that the statute does not exempt federally run facilities. The

state has admitted in its briefing that they do not apply this to federally run facilities, because of intergovernmental immunity concerns.

And we now also know that state-contracted facilities, in many instances, receive the benefit as well. In fact, GEO itself -- so GEO has a contract with the federal government for the Northwest Detention Facility. GEO also has a contract with the State of Washington DOC for the detention of state detainees. And in that contract they're required to pay $2 a day. So we know that the state itself does not apply the minimum wage to GEO.

THE COURT: Is there some institution that GEO runs for the state?

MR. BARNACLE: We included, in our reply brief, a contract between the Washington DOC and GEO, and it's for the detention of state inmates that GEO takes and detains them in other states. So they physically reside in other states, but these are state detainees. And the state law that allows this is -- these are for prisoners.

THE COURT: Wait a minute. Wait a minute. My question is, does GEO run a facility with State of Washington prisoners in it?

MR. BARNACLE: It has, yes.

THE COURT: Where is that?

MR. BARNACLE: The contract is between Washington DOC

and GEO from 2015 to 2018, and the GEO facility was in the state of Michigan, detaining Washington State inmates, and not paying them minimum wage for the work they performed.

THE COURT: Are those inmates subject to a Voluntary Work Program?

MR. BARNACLE: Yes, Your Honor, they have a similar program arranged.

THE COURT: Those are people that are in prison or jail?

MR. BARNACLE: Yes, Your Honor.

THE COURT: Not just detained?

MR. BARNACLE: Yes, these are prisoners, state prisoners.

So we know that this law favors three classifications of detention facilities. State run, federally run, and state contractors. So the only difference between GEO itself in the two circumstances is one is with the federal government and one is not.

In discussing the *U.S. v. California* case, I think this case is really poignant, in this context, because *U.S. v. California* talks specifically about federal immigration policies, and the fact that private contractors contracting with ICE perform a federal function. And *U.S. v. California* very importantly says, in the intergovernmental immunity context, the federal government and federal contractors are

treated the same.

So the comments in the briefing earlier that the state itself will not apply its Minimum Wage Act to federally run facilities because they understand and they know that they don't have jurisdiction to do so, because of intergovernmental immunity, that is an admission under *U.S. v. California* that a federal contractor in the immigration context is performing a federal function. And the court said they are treated the same.

So there's no reason, under that precedent, to treat them differently here.

Thank you.

THE COURT: Okay. Ms. Chien or Mr. Polozola.

MR. POLOZOLA: Good morning, Your Honor. Thank you for taking the time this morning. We appreciate it. And the United States' view of intergovernmental immunity to which GEO has belatedly latched onto, is an extraordinary and frankly unprecedented expansion of this doctrine, that if accepted would result in federal contractors being exempted entirely from neutral and generally applicable state laws. That is not proper and that is not the purpose of intergovernmental immunity.

And GEO is not the federal government and it is not running a federally owned facility. And it is not exempt from all regulations, which as I understand counsel's

argument a moment ago, GEO cannot be regulated, because the federal government cannot be regulated. That is unquestionably not the case, and that is longstanding Supreme Court precedent.

Now, there are a few key points to take head on. One, the court correctly decided previously, or correctly compared GEO -- excuse me -- to other similarly situated private entities, all of which are subject to the Minimum Wage Act. This is necessarily required under governing precedent, because the question is whether Washington law discriminates against GEO based on its status as a federal contractor, or has singled GEO out for worse treatment, and thereby meddled in the federal government affairs. That's a Supreme Court case, Your Honor.

An example of this, which Your Honor is aware of and cited correctly in the prior order, is the *National Security Agency Telecommunications* case from California. There, all unauthorized disclosures that were at issue were treated the same, regardless of who the contractors were. And the fact that they were dealing with the federal government, there were no heightened standards in that case. And the court correctly recognized that the non-discrimination rule prevents states from meddling with federal government activities by singling out, for regulation, those who deal with the government. It does not oblige special treatment,

which is what GEO seeks here.

And point two, you know, counsel has referenced today and the United States references in its brief, that the Subsection 3(k) exemption does not exempt federal contractors, and therefore there is discrimination because it treats state and federal institutions differently. A few points, Your Honor.

As counsel noted, all parties agreed that the federal government cannot and is not directly regulated in this case. And it's the wrong question. Because this is not a situation which the law is regulating the federal government directly, it's about a contractor, and in that case the question is whether the contractor is treated differently based on its status as a federal contractor.

Just like in *Dawson*, which counsel has referenced -- and Your Honor's certainly, I understand, to be curious about -- the question was whether the taxpayer was treated differently based on the source of his benefits. The court looks to how that taxpayer would be treated if that same taxpayer was dealing with the state versus the federal government. It was not to find any exemption anywhere and give that benefit to the federal government or its contractors.

And certainly I think the key point here, Your Honor, is that states can regulate federal contractors or suppliers, and if done in a non-discriminatory manner. And that's a

point that counsel I think ignores, but it's crucial here, because the Supreme Court in *North Dakota* was clear on this point. There's no direct regulation where the regulation applies to the contractor or supplier. And no duties are imposed directly on the federal government through that contractor.

Here, for the reasons that we've discussed earlier today, the Minimum Wage Act applies to GEO. It is not applying to the federal government. GEO has admitted that it can pay more, and that it would have no effect on the federal government, Your Honor.

On *California*, I will point out that counsel has relied on this. That court rejected all but one intergovernmental immunity challenge. And in doing so, recognizes that those contractors running those facilities can, in fact, be regulated. If counsel was correct that because the federal government cannot be regulated, any contractor running a facility for the federal government cannot be regulated, there would be no reason to have the non-discrimination rule in the first place. You would stop at direct regulation in every case. And that can't be the case, in light of the case law as it exists.

And ultimately what the United States has argued for, Your Honor, is a vast expansion. And they're essentially asserting that the Intergovernmental Immunity Doctrine bars

enforcement of any state law against a federal contractor, if the state government -- not similarly situated constituents -- but the state government is not subject to that same law.

Consider what that would mean in practice, Your Honor. Large federal contractors in Washington, like Boeing, GEO, or even Microsoft, could not be subject to neutral state taxes that the state doesn't pay. An example of those are the B&O tax, property tax, and sales tax. That's where you get, with the United States and GEO's reading of intergovernmental immunity.

And I'll briefly address, Your Honor, the exemption at 3(k). It does not apply to private contractors like GEO. The court has recognized that in its prior order, regardless of whether that exemption included the words "federal" or not, the treatment of GEO would remain the same. And that proves here that there is no discrimination. GEO would remain subject to that law.

And I do want to take on one issue counsel has raised, the GEO Washington contract from 2015 to 2018, which counsel agrees applies only to individuals outside of Washington. Certainly Washington does not take the position that it has the authority to enforce its Minimum Wage Act for work done in Michigan. But I do want to point out one additional issue, which is counsel represented that prisoners are actually held there, or were. There is nothing in the record

to suggest that's the case. And it's my understanding that the contract was, in fact, never utilized. So it was essentially a contingency plan for overflow, that was not used. To clarify that issue.

And, Your Honor, one additional point on the direct regulation argument. I certainly understand the court's position which you started with this morning, that you don't want to hear about procedural issues. I understand that. The one point I will make, if Your Honor will allow it, is to note that the direct regulation argument they raise was raised in reply. This is an argument they conceded they were not making in summary judgment. So it has not been fully briefed, with all due respect, Your Honor.

To the extent the court does wish to consider it and reject it now, which the state believes is appropriate, I would direct the court's attention to the *North Dakota* case. There's no direct regulation, again, as I noted earlier, where the regulations operate against the suppliers and not the government. Merely being an entity with whom the government deals does not automatically equate to direct regulation.

And in language that is applicable here, the Supreme Court cannot have been clearer in that case, when it explained then that over 50 years ago the court decisively rejected the argument that any state regulation which indirectly regulates

the federal government's activity is unconstitutional. In that case it was reporting and labeling requirements for liquor suppliers. Certainly if the federal government had undertaken that activity itself, it would have been exempt, it would be a direct regulation if the laws ran to the federal government itself. For the suppliers, they were not covered. That was not a direct regulation.

You know, Your Honor, if you would like additional briefing on this issue, we're happy to provide it. But I think the case law is quite clear that contractors are not automatically exempt, merely because they do business with the federal government. And that's what GEO seeks in this case. Thank you, Your Honor.

THE COURT: I've got some questions for you, but let me ask the defense for any comments in rebuttal.

MR. BARNACLE: Thank you, Your Honor.

Just one quick additional comment on *U.S. v. California*. Again, that case was directly relevant to our circumstances here. The court -- we were talking about the immigration context, they're talking about the application of federal immigration laws to a private contractor. In that case the court specifically said any direct or indirect regulation of the private contractor, a federal contractor in that case, could run afoul of the Intergovernmental Immunity Doctrine.

They specifically said, in the intergovernmental immunity

context, a federal contractor and the federal government are treated the same. So I'll let my colleague add one other thing.

MS. MELL: Your Honor, the record contains specific information about Washington State detainees, not convicted felons, doing work at subminimum wages without the state enforcing minimum wages. The best example is that in the early pleadings in this matter, all the photography and all of the articles and all of the factual information pertaining to the jail right up the street, there are individuals in that jail who are working for private contractors to prepare meals and to operate the facility and keep it clean, and they are not paid minimum wage. In fact, they are required to participate in the programs up there, and they are not paid anything.

The second piece of evidence that was introduced in my declaration that provides testimony from the Governor's office, the specific question was asked by the speaking agent of his staff to brief him on, does DOC contract with private entities for detention treatment or rehabilitation services? And it delineates three separate instances where that is the case. People who have served their confinement and are on release are working in programs at subminimum wages.

And importantly, the other record that exists in this court, is the sex offenders' litigation. The sex offenders

are on McNeil Island doing subminimum-wage work. And they are not confined based on any conviction history. They have sued and adopted the same reasoning here to say, well, if it's true for GEO detainees, it was certainly true for us. We should not have to be laboring in this manner. They also have transition programs out into the community where they're similarly not competing at minimum wages and the state has chosen to ignore them.

This is a particularized discriminatory action on behalf of the State of Washington that impairs the federal government's ability to apply its programs evenly under the policy objectives it has under its immigration laws, as well as its budgeting and management of the health, safety and welfare of the citizens it's responsible for, as well as those individual detainees who they are caring for as they pass them out of the country.

Thank you, Your Honor.

THE COURT: Well, I am curious about a number of things. One is the case law refers to a functional approach to the claim of immunity: Going back to the *North Dakota* case. What do you believe that the functional approach is as applied here, if you believe anything at all?

MR. POLOZOLA: Your Honor, I think the functional approach here is the recognition that the state has the authority to use generally applicable and neutral

regulations, and that this analysis must account for that authority. Private contractors cannot be given special treatment merely because they do business with the federal government. And I think that's what the functional approach -- that language, I think that's the point that the court was trying to account for, was to recognize that it's not that they can be regulated in no way. The question is whether they are regulated in a discriminatory way.

Thank you, Your Honor.

MR. BARNACLE: Your Honor, I believe analysis of the functional approach is something that you would analyze if there was a question of the application of the neutral law. The argument here is this is a neutral law, that's applied as such. And I believe that is flatly wrong here. It's not a neutral law. It's not applied in a neutral manner. GEO itself has a contract with ICE. The state is trying to apply the state minimum wage to GEO under that contract.

GEO also has had a contract with the State of Washington DOC for the running of a -- having state prisoners, Washington State prisoners in one of its facilities. And that particular contract did not -- they did not apply the minimum wage. In fact, they had a Voluntary Work Program that dictated two dollars a day. So we're not talking about a neutral application of a state law. We're talking about a discriminatory treatment where GEO itself is treated one way

dealing with ICE, and another way when it's dealing with the state.

So I think fundamentally we're not talking about a functional approach to this issue, when at its core we have a discriminatory application of the law.

THE COURT: Well, I guess in regard to the functional approach, I guess what it means to me is we need to look at what's actually happening and not just be limited to the papers. I think that's a lesson that teaches us that we have to look at exactly what's happening on the ground, not just what the papers might indicate.

Let me inquire of the state further about state-run facilities, detention facilities for non-criminals. Counsel referred to the Special Commitment Center. This record is so thick it's a little hard to pinpoint things in it. But is that part of the facts in this case, that the state runs a Voluntary Work Program at the Special Commitment Center that houses people that are civilly committed there?

MR. POLOZOLA: Your Honor, it is my understanding that there are work programs in state institutions. And I would need to confirm specifically for SCC, for fear of overrepresenting. But the point to note on this, Your Honor, is that these are state institutions. So even assuming there is, in the state's view it does not affect this analysis.

THE COURT: Counties and cities run jails. Do any

counties and cities have Voluntary Work Programs?

MR. POLOZOLA: I'm not aware specifically, Your Honor, of what programs they do or do not have.

THE COURT: Do you know, counsel?

MS. MELL: Yes, Your Honor. And the Pierce County Jail, right up the street, they have --

THE COURT: You're talking about the Pierce County Jail?

MS. MELL: The Pierce County Jail, yes, Your Honor. And that information is in the record. I put photographs of the jail, and I lined them up side-by-side.

THE COURT: Where in the record is that?

MS. MELL: Your Honor, I will give you a specific citation. And I can't give it to you off the top of my head. But it would be in the very early motion practice that was done. With my first declaration I attached it, and I had the photographs up here and was showing them. I actually displayed them on the viewer.

Your Honor, I did want to touch down on this functional application. The court is drilling down to the contention that it needs a factual recitation in order to know how to apply the intergovernmental immunity. But the court doesn't need any additional factual information where it understands that the health, safety and welfare of immigration detainees, during processing, to include mitigating their idle time with

programs like a Voluntary Work Program, is necessarily the functional issue at stake here.

The jurisdictional control over the health, safety and welfare of those detainees belongs to the federal government, just like the federal government has to ensure that their employees are fairly paid. The state can't come in and take over its supervisory authority or protective authority for detainees who are outside their jurisdiction.

And the other thing that is in the record, that's in the deposition testimony of the Governor's speaking agent, is that in -- there was a concession that in the prisons there were private contractors helping, that are contracted for the meal preparation, and the detainees work for them, if I didn't get that clear before.

THE COURT: Question to the state.

Doesn't the law require, in this analysis, that GEO be treated the same as the government itself?

MR. POLOZOLA: Your Honor, I don't think that's the proper analysis. I think the question is whether GEO is discriminated against based on its status as a federal contractor. In this case there is no such discrimination. If GEO in every circumstance was automatically equated with the federal government, there would never be a question of discrimination, because the federal government cannot be directly regulated.

So to the extent -- I think the case law you may be thinking of, Your Honor, is the statement that you cannot discriminate against the federal government or those with whom it deals. And certainly that is true. So GEO -- the state is not disputing that intergovernmental immunity could apply if there were, in fact, discrimination. But that's not the case here. So I don't think you should automatically equate the two, Your Honor.

And if I may, I'll just reiterate -- to reiterate one point, Your Honor. The examples just given are all state and county facilities. The dispute here isn't whether those facilities exist or use inmate labor. That's never been a disputed factual issue in this case, Your Honor. The question is what private contractor facilities in Washington are doing what GEO does? And counsel has not identified any others.

So for that, I would kind of encourage the court to imagine this in a situation where you have government actors on one side, private contractors on the other. In this case private contractors under the Minimum Wage Act, as properly construed, are treated the same. Both the state and the federal government would likewise --

THE COURT: Well, that's a question. Are they being treated the same by the state?

MR. POLOZOLA: "They" being, Your Honor...

THE COURT: They being anyone -- well, this goes to the question of what do we compare? But does the state treat itself differently than it wants to treat the federal government here in regard to the Minimum Wage Act application to detainees?

MR. POLOZOLA: Your Honor, the state and the federal government are treated the same. There's no dispute the federal government is not subject to the Minimum Wage Act. The question then becomes, are contractors treated differently? And this is to my point a moment ago, Your Honor, it's a legal question of how contractors are to be treated under the Minimum Wage Act. And Your Honor has rightfully recognized in the past that there is nothing in that exemption that exempts private contractors, regardless of whom they are dealing with. Under those circumstances, contractors are to be treated the same. They are not treated differently.

THE COURT: Well, are they treated differently than the state treats itself? For example, if the state says that the Minimum Wage Act applies to detainees on the tide flats, don't they have to, to be even, to apply the law evenly, don't they have to apply it to detainees at the Special Commitment Center over on the island?

MR. POLOZOLA: Your Honor, no. I think the exemption on its face is allowed. And this gets to the point I raised

right out of the gate, Your Honor. If the suggestion is that the state must confer every exemption or benefit that the government enjoys to any contractor that deals with the federal government, that's what I understand the argument to be. I think that is far too broad.

And the tax example I think here is telling. The question is if the federal government doesn't have to pay taxes, like the state government doesn't have to pay taxes, are federal contractors likewise to be exempted from state taxes? I think the answer is unquestionably, no. They can still be subjected to neutral and generally applicable laws, which is the case we have here.

THE COURT: Well, let me ask the defense here. What are we comparing? The case law is pretty clear that there has to be some comparison made. And exactly what is the appropriate comparison here? And another way to put that, I guess, is how does the Minimum Wage Act treat the state better than it treats the defendant in some way? In other words, where is the prejudice to the defense here?

MS. MELL: The prejudice to the defense is that the federal government would be precluded from allocating its resources in a way -- in the same way that the state does, because the state in 2007 passed a constitutional amendment that specifically authorized the use of private corporations, specifically authorized private corporations to use detainee

labor, period.

The Department of Labor and Industries then applied that and developed its ESA1, which is in the record. And the ESA1 explains Subsection K. And Subsection K describes the exemption for people under state custody. And it also adds an express sentence that the Department of Labor and Industries testified, if its an enforceable provision, that private contractors are treated the same as the state, with regard to detainees employed by a private contractor, when that employment is with the Department of Corrections, meaning while they're in detention.

So you can compare the state-to-state, or federal-to-state, and you can compare federal and state private corporation contractors, and you come up with the same discriminatory application, by analysis, with the premise in this lawsuit.

And, again, you have to return back to the issue of, you are discriminating against the federal government's ability to protect the health, safety and welfare of people in detention. Detention is the functional analysis, because that is the point in time when you have removed these individuals from the free market.

THE COURT: I think you're afield from my question.

MS. MELL: Okay.

THE COURT: Let's assume the state is right and that

the evidence might show that GEO is misusing the Voluntary Work Program and is basically running its program on labor that shouldn't be, you know, a-dollar-an-hour labor for work that should be done by other employed people that are not detainees.

MS. MELL: There's no place in the State of Washington where state detainees are subject to the Minimum Wage Act. So there would be no comparator to contend that the state may invade federal detainees' activities and decide that they would be subject to the federal Minimum Wage Act, whether participating in a program that's overseen by a private contractor, or whether participating in a program that's directly operated by a government entity.

The interesting issue is that prior to the Northwest Detention Center and that contract, the individuals held in the Northwest Detention Center were held in local jails. They were participating in those activities. The trustee programs. It's a matter of maintaining the facility. It's chores. It's what needs to be done to run the program.

So the whole concept of Voluntary Work Programs is outside the scope of the Minimum Wage Act, at its inception. So there is discrimination. And the representation that I have not stood before you and represented and cited to the record where private corporations are the contract entity with the state, using the detainee labor, is incorrect. Not only does

it happen in the state, it happens in the jails, it happens at the SCC. It happens everywhere.

THE COURT: You know -- go ahead, counsel, but this double-teaming is ordinarily not allowed.

MR. BARNACLE: Understood, and I apologize. Just tying back to your question and applying the two cases that I believe are at issue, *U.S. v. California* and *Dawson v. Steager*. Who are we comparing? I think that was your original question.

And I think under either the state's formulation or a broader formulation, which I think the statement of interest is arguing for, the same result is necessary. So, if we look at those cases, and I think those cases stand for the proposition that in the immigration context -- we're talking about *U.S. v. California* -- in the immigration context, intergovernmental immunity, if you have a contractor performing those functions, they stand in the same shoes as the federal government.

We're not talking about a broad application, like the state is arguing, that now the state can't regulate any federal activity at all. That's not what we're talking about. We're talking about *U.S. v. California,* which limits itself to the immigration context, and saying in this context the United States and the federal contractor stand in the same shoes.

So if that's the case, then comparing -- we have to compare how is the federal government, how is GEO being treated in this situation, in comparison to the state? And there's no question that in that context they are treated less favorably. They're applying minimum wage to GEO, which in the immigration context is the United States, according to *U.S. v. California*, and the state is exempted.

Or if you look at a more narrow approach, which I think the state is arguing, they're arguing state contractors are treated the same as federal contractors. That's what their argument is. And I don't think that's supported by *Dawson v. Steager*. I don't think that's supported by *U.S. v. California* in the immigration context.

But even if you look at that, again it says the relevant question is whether they are similarly situated to those who do, those who get the favorable treatment, those who are exempted from minimum wage. We know the state-run facilities are exempted. We know because they said it. Federal-run facilities are exempted. And we also know that state-contracted facilities, GEO itself in its DOC contract with Washington, was exempted.

So we've got all three of those circumstances where they're treated better. The only time that they're not treated favorably is when GEO is contracting with ICE. So I think under either comparison model we come to the same

result.

THE COURT: At least one of the cases spoke of an additional economic burden on the federal government. Is there some economic discrimination against the government here?

MR. BARNACLE: Absolutely. I think if we play out what the state is seeking in this circumstance, how this really works is if the pricing -- the pricing of the contract that GEO has with the federal government is based on assumptions. One of those assumptions is that the Voluntary Work Program is going to be a dollar a day, because that's what the contract says it's going to be. So if all of a sudden we have to pay minimum wage, GEO is ordered to pay minimum wage for this work, these chores, these details, the pricing of that contract would be entirely different. GEO would have built that assumption into its contract pricing proposal with ICE. And the cost to ICE, in that circumstance, is going to be considerably greater.

In addition to that, when GEO prices labor, they have a more significant markup when they actually profit off of labor. People they hire at minimum wage or higher, they profit off of that. They do not profit off of the Voluntary Work Program. It's a pass-through. It's a one-to-one reimbursement.

So if GEO all of a sudden has a minimum wage requirement

on the Voluntary Work Program, they're going to pass that cost, and it's going to be significant, to the federal government. And they're going to pay a more significant profit kicker on top of that. So the economic burden is inestimable. It would change the entire nature of the contract and the pricing.

MR. POLOZOLA: A few points, Your Honor, on the last question -- we can take them in reverse order -- on the economic burden. I respectfully disagree with counsel's representations. I think the United States filings in this case are telling in that regard. The United States was very clear that it will reimburse a dollar, and only a dollar, regardless of what else happens, and make no further statements in that way. It doesn't dispute that GEO could pay more, but it would still reimburse the dollar.

And so on that issue --

THE COURT: Well, I don't think we know if the government would reimburse them at a higher rate.

MR. POLOZOLA: Well, the statements from the government in this case were that the contract requires reimbursement of one dollar, but GEO could pay more. There is no corresponding --

THE COURT: GEO could pay more. But they wouldn't necessarily get it back from the government. That would have to be negotiated in a new contract provision.

MR. POLOZOLA: Exactly, Your Honor. And that's a speculative argument. Even accepting counsel's representations that it might result in some incidental economic burden, this is the exact argument that the Supreme Court in *North Dakota* is very clear on. Incidental effects such as this, when you're dealing with a general neutral regulation, do not constitute an improper direct regulation. To put it in the facts of the *North Dakota* case for Your Honor, the fact that it was going to be more expensive for the federal government to purchase liquor from suppliers who had to comply with that regulatory scheme, did not support the intergovernmental immunity challenge.

So I think to that point, Your Honor, the answer, regardless of what it is, doesn't save GEO's or the United States' argument.

And if I may, Your Honor, I want to turn back to *United States v. California* and this assertion that a federal function is being regulated. Again, *United States v. California* rejected intergovernmental immunity challenges, except for one. What that means is that there were numerous regulations that applied to these facilities at issue. They were allowed. It's not the case that if you happen to operate an immigration facility, that's a federal function, therefore you are exempt from all regulations.

So to the point here. What is regulated is an employment

relationship and a neutral state law. This says nothing about immigration, who may come, who may go, how the federal government must decide those questions. That is not what's at issue here. So we do fundamentally disagree with counsel on that point.

The reference that GEO continues to make to *U.S. v. California* comes from footnote 7. It's not a crucial part of the holding. I recognize that it does say that contractors can be treated like the government. But, again, it's a recognition of this discrimination principle, that if they're discriminated against, they may benefit from this doctrine. But it is not a blanket immunity.

On the factual questions that Your Honor has discussed with counsel a moment ago about other facilities, what this distills to, as I understand it, Your Honor, is GEO saying they're the only ones violating the law, therefore the law may not be enforced against them, because that would be discriminatory. They have not identified other privately run facilities that are doing what they do, and that is not a protection for GEO. That can't trigger the Intergovernmental Immunity Doctrine.

Finally, on the ESA1, the L & I policy that counsel has referenced, this is in our briefing, Your Honor, this is the exact argument that Your Honor rejected the first time on GEO's first motion for reconsideration. What that policy is

discussing is what is clear in the exemption. Individuals in state institutions receive the benefit of that exemption. They are not deemed employees in the exemption. If a private contractor is working in a state institution, the exemption on its face still applies.

It is not analogous to the circumstances here where you have a privately owned, privately operated facility that chooses to do business with a governmental entity.

That's all I have, Your Honor. I'm happy to answer any questions.

THE COURT: Let me look at my notes here.

The South Correctional Entity Regional Jail came to my attention, they call it SCORE, it's a cooperative effort by a number of cities that run this jail. I don't know if you're familiar with it, but I'm curious whether they have a Voluntary Work Program.

MR. POLOZOLA: Your Honor, I'm not familiar with that specific facility, so I'd be hard pressed to give guaranteed answers on that.

MS. MELL: As a matter of fact, one of the former chiefs from that department was going to be one of my expert witnesses in this case. Yes, SCORE has a similar type of program. And it's inherent in any kind of detention facility, you need to have something to keep people busy. And they do. And these are private contractors who work with

the detainees.

THE COURT: Okay. That's probably not part of the record of the case. But I was curious about it. Okay. Well, you've given me a lot to think about, which I will think about and write an order on. I know lawyers are always anxious. It's on the top of my pile. So hopefully early next week I'll have an answer on this remaining issue.

Okay. Thank you.

(Adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER